Admin. Nov. 13, 2015

Memorandum 2015-47

New Topics and Priorities

Annually, the Commission[1] reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively enacted Calendar of Topics Authorized for Study ("Calendar of Topics"). The Commission generally undertakes this analysis after the Legislature has adjourned for the year.

To assist the Commission in that process, this memorandum summarizes the status of the topics that the Legislature has directed the Commission to study, the other topics that the Commission is actively studying, the topics that the Commission has previously expressed an interest in studying, and the new topics suggestions received in the last year. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting. Absent discussion, the staff will handle the topic as recommended in this memorandum.

The following letters, email communications, and other materials are attached to and discussed in this memorandum:

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

PREFATORY NOTE

In reviewing this memorandum, Commissioners and other persons should bear in mind that the Commission's resources are very limited and its existing workload is substantial.

The Commission's current staff is small. The staff includes four attorneys, only two of whom are full-time. In addition, the Commission staff includes a secretary and a half-time administrative analyst. The Commission also receives some assistance from externs and other law students, particularly from UC Davis School of Law. In accordance with a change in Commission practice earlier this year, the law students are assigned "relatively modest and uncontroversial law reform projects, within the Commission's study authority."[2]

While its staff resources are quite limited, the Commission must nonetheless continue to demonstrate its value to the state by producing high quality reports that significantly improve the law and benefit the citizens of California. To accomplish this goal, **the Commission must use its resources wisely, focusing on projects that serve the Legislature's needs or appear likely to lead to helpful changes in the law.**

Similarly, the Legislature has made clear that it wants the Commission to focus its efforts on such projects. For example, it has directed the Commission to notify the judiciary committees upon commencing a new study. A recent bill analysis explains the purpose of that requirement:

> Given the limited resources of the commission which has suffered budget cuts in past years, early communication to the Legislature of proposed topics of study would allow legislative input on whether a particular proposed topic would likely be controversial and thus perhaps avoided by the commission so that it may devote its limited resources to other, more productive studies.[3]

2. Minutes (Apr. 2015), p. 3.
3. Assembly Committee on Judiciary Analysis of SCR 83 (Jun. 6, 2014), p. 3 (emphasis added).

COMMISSION AUTHORITY

The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: (1) those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and (2) those that the Legislature assigns to the Commission directly, by statute or concurrent resolution.[4]

In the past, the bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Once the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments have become much more common in recent years. Currently, all of the Commission's active studies are direct assignments from the Legislature.[5]

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. One of these assignments, transfer on death deeds, came out of the 2015 legislative session. All of the current legislative assignments are described below.

Transfer on Death Deeds

In September 2015, the Governor signed Assembly Bill 139 (Gatto) into law.[6] This bill directs the Commission to

> … study the effect of California's revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.
>
> (b) In the study required by subdivision (a), the commission shall address all of the following:
>
> (1) Whether the revocable transfer on death deed is working effectively.

4. Gov't Code § 8293.
5. See Exhibit p. 30.
6. 2015 Cal. Stat. ch. 293.

(2) Whether the revocable transfer on death deed should be continued.

(3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.

(4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.

(5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

This study is a direct legislative assignment with a specified deadline. Typically, the Commission gives highest priority to such a study.

In this case, the study is intended to evaluate the operation of the newly-authorized revocable transfer on death deeds. To allow affected parties to gain experience with these deeds, the main study work will be undertaken after the statute has been in operation for a period of time. **As discussed in Memorandum 2015-53, the staff will be monitoring the situation and contacting stakeholders, but does not anticipate that the Commission will need to devote much time to this study in 2016.**

Recognition of Tribal and Foreign Court Judgments

In August 2014, the Governor signed Senate Bill 406 (Evans) into law.[7] This bill directs the Commission to:

> … within existing resources, conduct a study of the standards for recognition of a tribal court or a foreign court judgment, under the Tribal Court Civil Money Judgment Act (Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure) and the Uniform Foreign-Country Money Judgments Recognition Act (Chapter 2 (commencing with Section 1713) of Title 11 of Part 3 of the Code of Civil Procedure). On or before January 1, 2017, the California Law Revision Commission shall report its findings, along with any recommendations for improvement of those standards, to the Legislature and the Governor.[8]

In addition to making this assignment, the bill establishes the Tribal Court Civil Money Judgment Act ("Tribal Act") to govern the process of recognizing and enforcing tribal court civil money judgments.[9] By its own terms, the Tribal

7. 2014 Cal. Stat. ch. 243.
8. 2014 Cal. Stat. ch. 243, § 1.
9. 2014 Cal. Stat. ch. 243, § 4.

Act sunsets on January 1, 2018, unless a later enacted statute deletes or extends that date.[10]

The Legislature requires the Commission to report its findings "[o]n or before January 1, 2017." This date was specifically selected to ensure that the Legislature would have time to act, with the benefit of the Commission's report, prior to the 2018 sunset date of the Tribal Act.[11]

This study is a direct legislative assignment with a specified deadline. Typically, the Commission gives highest priority to such a study. **The staff recommends that the Commission continue to give this topic high priority to ensure completion of the work in the timeline directed by the Legislature.**

Electronic Communications: State and Local Agency Access to Customer Information from Communications Service Providers & Government Interruption of Communication Services

In September 2013, Senate Concurrent Resolution 54 (Padilla) was adopted. This resolution directs the Commission to:

> … report to the Legislature recommendations to revise statutes governing access by state and local government agencies to customer information from communications service providers in order to do all of the following:
>
> (a) Update statutes to reflect 21st Century mobile and Internet-based technologies.
>
> (b) Protect customers' constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures.
>
> (c) Enable state and local government agencies to protect public safety.
>
> (d) Clarify the process communications service providers are required to follow in response to requests from state and local agencies for customer information or in order to take action that would affect a customer's service, with a specific description of whether a subpoena, warrant, court order, or other process or documentation is required[.][12]

In accordance with the authorization in SCR 54, the Commission has undertaken studies on two topics: (1) Government Access to Electronic Communications and (2) Government Interruption of Communications.[13]

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10. 2014 Cal. Stat. ch. 243, §§ 2, 3, 4.
11. See Assembly Committee on Judiciary Analysis of SB 406 (June 13, 2014), p. 8.
12. 2013 Cal. Stat. res. ch. 115.
13. See Minutes (Feb. 2015), p. 4.

The Commission has made significant progress on both topics in 2015. The Commission prepared a final report on *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements* (Aug. 2015), but postponed work on any reform recommendations due to pending legislation.[14] The Commission also began work on the Government Interruption of Electronic Communications study.[15]

In 2015, the Legislature passed and the Governor signed Senate Bill 178 (Leno), which relates to the study of Government Access to Electronic Communications.[16] This legislation will be discussed in Memorandum 2015-51, as well as next steps in that study.

SCR 54 does not set a deadline for completion of the assignment, but the consistent legislative attention indicates that these topics are priority issues. **The Commission should continue to give these topics high priority.**

Fish and Game Law

In January 2012, the Commission received a letter jointly signed by the Chair of the Senate Natural Resources and Water Committee (Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (now former Assembly Member Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code.[17] The same year, the Legislature granted the necessary authority to conduct the study:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
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> Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law ….[18]

Although the resolution does not set a deadline for completion of the study, the Legislature presumably would like the work completed promptly.

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14. See generally Memorandum 2015-51.
15. See, e.g., Memorandum 2015-18.
16. 2015 Cal. Stat. ch. 651.
17. See Memorandum 2012-5, Exhibit pp. 32-33.
18. 2012 Cal. Stat. res. ch. 108.

The Commission made significant progress on this topic in 2015. As in previous years, the Commission, in the course of its work, identified a number of beneficial changes that could be made before completion of the entire recodification. It approved a final recommendation that would implement the identified changes[19] and the staff will seek introduction of the proposed legislation in 2016.

While the Commission made significant progress on this topic in 2015, much work remains to complete the entire recodification. **The Commission should continue to give this topic high priority.**

The Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

In 2012, Assembly Member Wagner introduced a bill to create a new exception to the law governing the confidentiality of mediation communications. Under that bill as introduced, confidentiality would not apply to:

> The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.[20]

During the legislative session, the bill was amended to remove its substance and instead require the Commission to study the matter. The bill was not enacted. Instead, the resolution relating to the Commission's Calendar of Topics was amended to authorize the proposed Commission study, thus:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (a) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:
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> (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51

19. See Memorandum 2015-40; Minutes (Oct. 2015), p. 7.
20. AB 2025 (Wagner), as introduced Feb. 23, 2012.

> Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.
>
> (2) The availability and propriety of contractual waivers.
>
> (3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.
>
> (b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.[21]

The Commission has devoted significant time to this topic in 2015, however there is still much to be done before the study is completed. **While the resolution does not set a deadline for completion of the study, the Commission should consider this a legislative priority and continue to prioritize work on this topic.**

Deadly Weapons

In 2006, the Legislature directed the Commission to study the statutes relating to control of deadly weapons.[22] The objective was to propose legislation that would clean up and clarify the statutes, without making substantive changes. The Commission completed its final report on this topic in compliance with the due date of July 1, 2009. Two voluminous bills[23] and some follow-up legislation[24] have since been enacted, fully implementing the recodification.

In addition to the recodification, the 2009 report included a list of "Minor Clean-Up Issues for Possible Future Legislative Attention."[25] The Legislature authorized the Commission to study those issues.[26]

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21. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).
22. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)).
23. See 2010 Cal. Stat. ch. 178 (SB 1115 (Committee on Public Safety)); 2010 Cal. Stat. ch. 711 (SB 1080 (Committee on Public Safety)).
24. See 2013 Cal. Stat. ch. 76, §§ 145.5, 147.3, 153.5 (AB 383 (Wagner)); 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 227 (SB 1171 (Harman)); 2011 Cal. Stat. ch. 285 (AB 1402 (Committee on Public Safety)).
25. *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009).

In 2014, the Legislature enacted Assembly Bill 1798, which implements a Commission recommendation addressing some of the minor clean-up issues.[27]

In 2015, the Commission approved a final recommendation addressing additional clean-up items. **The staff will seek introduction of implementing legislation in 2016.**

As time permits, the Commission should continue to consider the minor clean-up matters identified in its earlier report.

Trial Court Unification Follow-Up Studies

Government Code Section 70219 directs the Commission and the Judicial Council to study certain topics identified in the Commission's report on *Trial Court Unification: Revision of Codes*.[28] The Commission was given primary responsibility for some of those topics, the Judicial Council was given primary responsibility for other topics, and a few topics were jointly assigned to the Commission and the Judicial Council.

Topics For Which the Commission Has Primary Responsibility

The Commission has completed work on all but one of the topics for which it has primary responsibility. The remaining topic is publication of legal notice in a county with a unified superior court.

At the Commission's October meeting, the Commission approved a final recommendation on this topic.[29] **The staff will seek introduction of implementing legislation in 2016.**

Topics Jointly Assigned to the Commission and the Judicial Council

As discussed in a prior memorandum,[30] work on the topics jointly assigned to the Commission and the Judicial Council has either been completed or has been on hiatus for more than a decade. **At this point, it seems reasonable to consider these matters closed** (subject to possible reopening if appropriate circumstances arise).

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26. See 2010 Cal. Stat. ch. 711, § 7.
27. See *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013); 2014 Cal. Stat. ch. 103.
28. 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).
29. See Minutes (Oct. 2015), pp. 3-4.
30. See Memorandum 2014-41, p. 9.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform).[31] In response to this directive, the Commission has done a vast amount of work. Six bills and a constitutional measure implementing revisions recommended by the Commission have become law, affecting over 1,700 sections throughout the codes.[32]

More work needs to be done to complete the assigned task of revising the codes to reflect trial court restructuring. **Consistent with other demands on staff resources, the Commission should continue its work in this area.**

Enforcement of Money Judgments

Code of Civil Procedure Section 681.035 authorizes the Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority.

In the course of the Commission's new study regarding tribal and foreign country money judgments, the staff anticipates that there may be ancillary issues that could be addressed by the Commission in accordance with this related authority. **However, there are currently no active studies focusing solely on this topic.**

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature.[33] The Commission exercises this authority from time to time.

In 2015, the Commission, in conjunction with preparing a final recommendation on Fish and Game Law,[34] uncovered several cross-reference errors in a section of the Health and Safety Code.[35] The cross-reference errors were not limited to provisions that relate to fish and game. Therefore, the

31. See Gov't Code § 71674.
32. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56; 2010 Cal. Stat. ch. 212, §§ 2, 3, 6, 7, 8, 10, 11, 12; 2012 Cal. Stat. ch. 470; 2002 Cal. Stat. ch. 88 (ACA 15), approved by the voters Nov. 5, 2002 (Prop. 48).
33. Gov't Code § 8298.
34. See Memorandum 2015-40, pp. 8-9.
35. Health & Safety Code § 131052.

Commission decided to conduct a separate study to identify and correct the remaining cross-reference errors in the Health and Safety Code provision.[36]

As time permits, the Commission should begin work on this new matter.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court.[37] The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily propose legislation to effectuate these recommendations.

No new action on this topic is required at this time.

CALENDAR OF TOPICS

The Commission's Calendar of Topics currently includes 23 topics.[38] The next section of this memorandum reviews the status of each topic listed in the Calendar. On a number of the listed topics, the Commission has completed work, but the topic is retained in the Calendar in case corrective legislation is needed in the future.

In a number of instances, we also describe some possible areas of future work, which have been raised in previous years and retained for further consideration. New suggestions are discussed later in this memorandum.

1. Creditors' Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditors' remedies. In 1982, the Commission obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of this statute, the Commission has submitted a number of narrower recommendations on this topic to the Legislature.

A possible subject for study under this topic is discussed below.

36. See Memorandum 2015-40, pp. 8-9; Minutes (Oct. 2015), p. 8.
37. Gov't Code § 8290.
38. See 2014 Cal. Stat. res. ch. 63.

Judicial and Nonjudicial Foreclosure of Real Property Liens

The Commission has long recognized that foreclosure is a topic in need of work. Nevertheless, the Commission has consistently deferred undertaking a project on this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

Previously, the Commission has received suggestions from a number of sources regarding foreclosure procedure.[39] The Commission has not pursued any of those suggestions, but has kept them on hand.

In recent years, the Legislature has enacted several foreclosure-related reforms,[40] and the federal government has also pursued reforms in this area.[41] In addition, four pending cases before the California Supreme Court address foreclosure-related issues.[42] **Given the changing policy landscape on this topic, unless the Legislature affirmatively seeks the Commission's assistance, it does not appear to be a good time for the Commission to commence a study of foreclosure.**

2. Probate Code

The Commission drafted the current version of the Probate Code in 1990. The Commission continues to monitor experience under the code, and make occasional recommendations.

The Commission is currently involved in, or has previously expressed interest in pursuing, a number of probate-related topics, as discussed below.

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39. See, e.g., Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; Memorandum 2005-29, p. 20; Memorandum 2002-17, p. 5 & Exhibit p. 47; Memorandum 2001-4, Exhibit pp. 1-2.

40. See, e.g., 2012 Cal. Stat. ch. 86 (AB 278 (Eng)); 2012 Cal. Stat. ch. 87 (SB 900 (Leno)); 2012 Cal. Stat. ch. 562 (AB 2610 (Skinner)); 2012 Cal. Stat. ch. 569 (AB 1950 (Davis)); 2012 Cal Stat. ch. 568 (AB 1474 (Hancock)); 2012 Cal. Stat. ch. 201 (AB 2314 (Carter)); 2013 Cal. Stat. ch. 65 (SB 426 (Corbett)); 2013 Cal. Stat. ch. 251 (SB 310 (Calderon)); 2014 Cal. Stat. ch. 198 (SB 1051(Galgiani)).

41. See, e.g., P.L. 110-289 (Secure and Fair Enforcement for Mortgage Licensing Act of 2008); P.L. 111-22 (Protecting Tenants at Foreclosure Act of 2009, law sunsetted as of Dec. 31, 2012); P.L. 111-203 (2010), P.L. 110-343 (2008); see also http://www.consumerfinance.gov/mortgage-rules-at-a-glance/ (Summary of Consumer Financial Protection Bureau Mortgage Rules).

42. See Coker v. JP Morgan Chase Bank, N.A., 218 Cal. App. 4th 1, 159 Cal. Rptr. 3d 555 (2013), *review granted*, 312 P.3d 829, 164 Cal. Rptr. 3d 413 (Nov. 20, 2013, No. S213137); Yvanova v. New Century Mortgage Corp., 226 Cal. App. 4th 495, 172 Cal. Rptr. 3d 104 (2014), *review granted*, 331 P.3d 1275, 176 Cal. Rptr. 3d 266 (Aug. 27, 2014, No. S218973); First Cal. Bank v. McDonald, 231 Cal. App. 4th 550, 181 Cal. Rptr. 3d 148 (2014), *review granted*, 342 P.3d 1232, 184 Cal. Rptr. 3d 78 (Feb. 25, 2015, No. S222858); Castro v. IndyMac INDX Mortgage Loan Trust 2005-AR21, 2015 Cal. App. Unpub. LEXIS 4065 (2015), *review granted*, 2015 Cal. LEXIS 6216 (Sept. 16, 2015, No. S227876).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

In 2014, a bill was enacted to implement the Commission's recommendation on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.[43]

At this point, the main work on this study is complete. However, the staff anticipates that there might be some follow-up issues to address. The staff will monitor this topic to determine whether any issues arise that require the Commission's attention.

Creditor Claims, Family Protections, and Nonprobate Assets

A few years ago, the Commission accepted an offer from its former Executive Secretary, Nathaniel Sterling, to prepare a background study on the liability of nonprobate transfers for creditor claims and family protections. In other words, if a decedent's property passes outside of probate (e.g., by a trust, joint tenancy, or transfer-on-death beneficiary designation), to what extent should that property be liable to satisfy the decedent's creditors (including persons who are entitled to the "family protections" applicable in probate)? And what procedures should be used to address any such liability?

Mr. Sterling summarizes the underlying problem as follows:

> The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent's just debts and to protect a decedent's surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.[44]

In 2010, the Commission circulated the background study for a 120-day public comment period.[45] Copies of the study were sent, with a request for review and comment, to a number of interested groups and individuals. No detailed comments were received in response to that request. The Commission did not follow up at that time, because new assignments from the Legislature had pushed the matter to the back burner.

In June 2013, the Commission considered a memorandum introducing this study and approved the general approach to the study outlined in that

43. 2014 Cal. Stat. ch. 553 (SB 940 (Jackson)).
44. See Memorandum 2012-45, Exhibit p. 2.
45. See Memorandum 2010-27; Minutes (June 2010), p. 7.

memorandum.[46] However, further work on the topic was suspended due to other demands on staff resources.

While the Commission gives some priority to active studies and studies for which we have an expert consultant, we have generally given higher priority to direct legislative assignments. Given our current slate of direct legislative assignments, we do not have the staff resources to proceed with this study at this time. **The staff proposes to return to this study once our higher priority workload has eased.**

Presumptively Disqualified Fiduciaries

A number of years ago, the Legislature directed the Commission to study the operation and effectiveness of Probate Code provisions that establish a statutory presumption of fraud and undue influence when a person makes a gift to a "disqualified person" (i.e., to the drafter of the donative instrument, to a fiduciary who transcribed the donative instrument, or to the care custodian of a transferor who is a dependent adult). After studying the topic, the Commission recommended a number of improvements to those provisions.[47] Legislation to implement that recommendation was introduced as SB 105 (Harman) in 2009.

The same year, the Commission began studying a related matter — whether the statutory presumption described above should also apply to an instrument naming a fiduciary. In other words, should there be a presumption of fraud or undue influence when an instrument names a "disqualified person" as the fiduciary of the person executing the instrument?

Because of the functional interrelationship between the two studies (both would apply the same factual predicate and evidentiary rules in defining the scope and effect of the presumption), the Commission decided to table the latter study until after the Legislature decided the fate of SB 105.

In 2010, the Legislature enacted SB 105, with amendments.[48] **With that matter settled, the Commission should consider reactivating its study of presumptively disqualified fiduciaries when its resources permit.**

46. Memorandum 2013-25; Minutes (June 2013), p. 14.
47. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).
48. 2010 Cal. Stat. ch. 620; Prob. Code §§ 21360-21392.

Uniform Custodial Trust Act

In 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act.

California has not yet adopted the Uniform Custodial Trust Act, so the matter remains an appropriate topic for study. However, **this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

3. Real and Personal Property

The study of property law was authorized by the Legislature in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

One topic under this umbrella authority is discussed below.

Mechanics Lien Law

Several years ago, the Commission recommended a complete recodification of mechanics lien law. The laws implementing the recodification of mechanics lien law became operative on July 1, 2012.[49]

In preparing the recommendation and seeking its enactment, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that the recodification should be addressed separately from any significant substantive changes, which may be appropriate for future work by the Commission.

The staff recommends deferring the commencement of any new work on mechanics liens, so that such work can benefit from additional experience with the new statutory scheme.

4. Family Law

The Family Code was drafted by the Commission in 1992. Since then, the general topic of family law has remained on the Commission's agenda for ongoing review.

49. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).

One aspect of this topic, which the Commission has kept in mind for possible future study, is discussed below.

Marital Agreements Made During Marriage

California has enacted the Uniform Premarital Agreements Act, as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. Yet there is no general statute governing marital agreements made during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

In 2012, the Uniform Law Commission ("ULC") approved the Uniform Premarital and Marital Agreements Act. Any Commission study of this topic should begin by examining the uniform act.

If the Commission decides to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements.[50] In particular, the Commission could study circumstances in which the right to support can be waived.[51]

This is an appropriate topic for Commission study, however it does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

5. Discovery in Civil Cases

Some time ago, the Commission undertook a study of civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms were enacted, most recently the Commission's recommendation on *Deposition in Out-of-State Litigation*.[52] No new proposal is in progress at this time.

The Commission has on hand numerous suggestions relating to various aspects of civil discovery; it has also identified other topics of interest. Thus far, the focus has been on relatively noncontroversial issues of clarification. This approach has been successful and may be more productive than investigating a major reform that might not be politically viable.

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50. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36.
51. See In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).
52. 37 Cal. L. Revision Comm'n Reports 99 (2007).

The Commission should consider reactivating the discovery study when its resources permit. At that time, it can assess which discovery topic to pursue next.

6. Rights and Disabilities of Minor and Incompetent Persons

Since authorization of this study in 1979, the Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons. There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case such a proposal is presented in the future.**

7. Evidence

The Evidence Code was enacted in 1965 on recommendation of the Commission. Since then, the Commission has had continuing authority to study issues relating to the Evidence Code. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez (UC Davis School of Law and Stanford Law School), which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. A number of years ago, the Commission began to examine some topics covered in the background study, but encountered resistance from within the Legislature and suspended its work in 2005.

The staff later compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial.[53] The Commission directed the staff to seek guidance from the judiciary committees regarding whether to pursue those issues. The staff explored this matter to some extent, without a clear resolution. **Unless the Commission otherwise directs, the staff will raise the matter with the judiciary committees again, but not until there is a realistic possibility of being able to work on this matter.**

8. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961, on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

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53. See Memorandum 2006-36, Exhibit pp. 70-71.

At this time, the Commission is not actively working on any proposal pursuant to that grant of authority. **However, the topic should be retained on the Calendar of Topics, in case such work appears appropriate in the future.** For instance, the Commission's ongoing study of mediation confidentiality discussed above might alert the Commission to other aspects of alternative dispute resolution that warrant attention.

9. Administrative Law

This topic was authorized for Commission study in 1987, both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

10. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988, pursuant to a suggestion of the California Judges Association ("CJA"). The staff did a substantial amount of preliminary work on the topic in 1990, but the work was suspended pending guidance from CJA on specific problems requiring attention, which were never identified.

In 1999, the Commission began studying one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission considered a number of issues and drafts, but had to put the matter on the back burner in 2001 due to other demands on staff and Commission time.

The Commission has also considered studying the possibility of standardizing various attorney's fee statutes.

The Commission might want to turn back to the topic of attorney's fees at some time in the future, when its resources permit.

11. Uniform Unincorporated Nonprofit Association Act

In 1993, the Commission was authorized to study whether California should enact the Uniform Unincorporated Nonprofit Association Act. The Commission ultimately decided not to recommend enactment, but made other

recommendations to clarify the status and governance of unincorporated associations, which were enacted.

In 2008, the ULC revised the Uniform Unincorporated Nonprofit Association Act. At some point, it may be appropriate to examine the revised act and consider whether to adopt any aspect of it in California. In any event, **the Commission should retain the topic on its Calendar of Topics, in case issues arise relating to provisions enacted on its recommendation**.

12. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have since been enacted.

Further work still needs to be done, as discussed above under "Trial Court Unification Follow-Up Studies" and "Trial Court Restructuring."

The Commission also did extensive work on two other projects: (1) appellate and writ review under trial court unification (Study J-1310), and (2) equitable relief in a limited civil case (Study J-1323). The Commission tabled those projects years ago for budgetary reasons,[54] and the attorney who handled them has since retired. We have not received any communications urging the Commission to reactivate these studies. **At this point, it seems appropriate to regard these matters closed** (subject to possible reopening if appropriate circumstances arise).

13. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, which includes a study of the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters. In this regard, for the past decade or so the staff has been lightly monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"), including possible preemption of California's version of UETA by the federal Electronic Signatures in Global and National Commerce Act.[55] **The staff will continue to monitor this situation, but does not recommend commencing a project in this area until the courts have offered more guidance on the preemption issue.**

54. See Memorandum 2008-40, pp. 3-4.
55. See Memorandum 2014-41, p. 19.

14. Common Interest Developments

Common interest development ("CID") law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission has been actively engaged in a study of various aspects of this topic since that time, and has issued several recommendations, most of which have been enacted.

Most recently, the Legislature enacted Commission recommendations to (1) recodify the Davis-Stirling Common Interest Development Act,[56] and (2) create a new and separate act for commercial and industrial common interest developments.[57]

The Commission has a long list of possible future CID study topics. For example, the Commission previously decided to address miscellaneous other areas of CID law in which the application of the Davis-Stirling Act appears inappropriate or unclear — e.g., a stock cooperative without a declaration, a homeowner association organized as a for-profit association, or a subdivision with a mandatory road maintenance association that is not technically a CID.[58]

Given our extensive work in this area of law, it would make sense to return to such matters as resources permit. At that time, the Commission can assess which CID topics to pursue next.

15. Statute of Limitations for Legal Malpractice

A number of years ago, the Commission did extensive work on the statute of limitations for legal malpractice. After circulating both a tentative recommendation and a revised tentative recommendation, the Commission decided that further work probably would be unproductive and discontinued the study without issuing a final recommendation. **The topic remains on the Commission's Calendar of Topics, in case future developments make it worthwhile to recommence work in this area.**

56. See 2012 Cal. Stat. ch. 180 (AB 805 (Torres)); 2012 Cal. Stat. ch. 181 (AB 806 (Torres)); see also 2013 Cal. Stat. ch. 183 (clean-up legislation) (SB 745 (Committee on Transportation and Housing)).
57. 2013 Cal. Stat. ch. 605 (SB 752 (Roth)).
58. See Minutes (Oct. 2008).

16. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important study, we have not given it priority. **In light of current constraints on Commission and staff resources, the staff does not recommend that the Commission undertake a project of this scope and complexity at this time.**

17. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission began to work on this matter, but received negative input and the proposal was tabled.

In 2006, the Legislature directed the Commission to study and report on a nonsubstantive reorganization of the statutes governing deadly weapons, which include criminal sentencing enhancements relating to the possession or use of deadly weapons. That study has now been completed, but follow-up work is still in progress.[59] **In light of its possible relevance to the deadly weapons study, the existing authority to study criminal sentencing should be retained.**

18. Subdivision Map Act and Mitigation Fee Act

In 2001, a study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics, at the request of the Commission. The objective of the study would be a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

This project would be a massive, mostly nonsubstantive recodification. Recent experience shows that such projects can take several years to complete and the results may be difficult to enact. **In light of current limitations on Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

59. See discussion in "Current Legislative Assignments," above.

19. Uniform Statute and Rule Construction Act

In 2003, a study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics, at the request of the Commission.

The Commission has previously indicated its intention to give this study a low priority. **The staff does not recommend that the Commission undertake this project at this time.**

20. Venue

In 2007, the Calendar of Topics was revised at the Commission's request, to add a study of "[w]hether the law governing the place of trial in a civil case should be revised."[60] That request was prompted by an unpublished decision in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes."[61] The court of appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel, which in turn alerted the Commission.

The Commission should begin work in this area when its resources permit. **Unfortunately, that is not likely to be possible in the coming year.**

21. Charter School as a Public Entity

In 2009, the Legislature directed the Commission to analyze "the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code," which governs claims and actions against public entities and public employees.[62] The Commission issued its final report on that topic in 2012.[63] No further work on this topic is currently pending. **Nonetheless, it would be prudent to preserve our existing authority, in case any future questions arise that the Commission needs to address**.

60. 2007 Cal. Stat. res. ch. 100.
61. See Memorandum 2005-29, Exhibit p. 59.
62. See 2009 Cal. Stat. res. ch. 98.
63. See *Charter Schools and the Government Claims Act,* 42 Cal. L. Revision Comm'n Reports 225 (2012).

22. Fish and Wildlife Law

See discussion of this topic under "Current Legislative Assignments," above.

23. The Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

See discussion of this topic under "Current Legislative Assignments," above.

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

When it considered last year's memorandum on new topics, the Commission retained several suggestions for future reconsideration. Those carryover suggestions are briefly described below; further detail is available in the sources cited. Given the Commission's current slate of legislative assignments, **the staff expects that the Commission will again lack the resources to undertake work on any of these carryover suggestions.**

Generally, the carryover topics appear to be issues that the Commission is well-suited to address. **The staff recommends that these issues be retained for future consideration by the Commission once the Commission's workload eases.**

Intestate Inheritance by a Half-Sibling[64]

Marlynne Stoddard of Newport Beach asked the Commission to study intestate inheritance by a half-sibling who lacks a familial relationship with the decedent.[65] Currently, California's law on intestate succession provides that "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood."[66] Ms. Stoddard provides the example of the estate of her brother, who died intestate; Ms. Stoddard, who "had a very close relationship" with her brother, and two estranged half-siblings each received a one-third share of her brother's estate.[67] Ms. Stoddard indicated that "the current half-blood statute … produces grossly unfair and irrational results in cases like mine."[68]

64. See full analysis in Memorandum 2013-54, pp. 22-23.
65. See Memorandum 2012-5, Exhibit pp. 48-51.
66. Prob. Code § 6406.
67. See Memorandum 2012-5, Exhibit pp. 48-51.
68. *Id.* at 50.

Homestead Exemption — Challenge to Existence of a Dwelling[69]

Attorney John Schaller, of Chico, raised the issue of the lack of "procedure in the Code for a creditor who levies on real property to get rid of falsely recorded homestead filings in the situation where there is no dwelling on the property."[70] Based on the staff's preliminary research, Mr. Schaller appears to be correct that the Code of Civil Procedure does not provide clear guidance on what procedure to follow when there is a dispute over the existence of a dwelling on the debtor's property (as opposed to a dispute regarding whether a dwelling is the debtor's homestead, and thus qualifies for the homestead exemption). Mr. Schaller's issue would be a relatively narrow matter of clarification, which relates to the Commission's previous work on enforcement of judgments and the homestead exemption.

California Tribal Governments and California Indians[71]

Several years ago, the California Association of Tribal Governments ("CATG"), the non-profit statewide association of federally recognized California Indian tribes,[72] requested that the Commission "add to its agenda of active studies an examination of California law concerning California tribal governments and California Indians."[73] However, CATG did not provide any specific examples of issues warranting the Commission's attention, instead suggesting that any questions be directed to its Executive Director. Previously, the staff invited CATG to provide further information regarding the types of issues that it would like the Commission to address.[74] The Commission has not received further correspondence from CATG.

However, in its recent work, the Commission has been becoming familiar with tribal issues generally. The Commission encountered a tribal law issue in its recent work on UAGPPJA.[75] In addition, the Commission is currently studying the recognition of certain tribal court civil money judgments.[76]

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69. See full analysis in Memorandum 2013-54, pp. 23-24.
70. *Id.*
71. See full analysis in Memorandum 2013-54, pp. 25-26.
72. Memorandum 2012-5, Exhibit p. 34.
73. *Id.*
74. Memorandum 2012-45, p. 26.
75. Memorandum 2013-8, pp. 2-4, 7-10; Memorandum 2013-40, pp. 6-7; Memorandum 2013-45.
76. See discussion of "Recognition of Tribal and Foreign Court Judgments" *supra*.

Civil Procedure: Stay of Trial Court Proceeding During Appeal[77]

Attorney H. Thomas Watson suggested that the Commission consider a proposed amendment[78] of Code of Civil Procedure Section 916 that "seeks to resolve the anomalous split of authority" on whether a trial court retains jurisdiction to resolve a motion for judgment NOV while a case is stayed during an appeal.[79] His proposed amendment was offered to ensure the trial court "retain[s] jurisdiction to rule on all post-trial motions regardless of whether a notice of appeal is perfected."[80]

If Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

Uniform Trust Code[81]

Nathaniel Sterling, the Commission's former Executive Secretary, wrote on behalf of the California Commission on Uniform State Laws, to request that the Law Revision Commission "make a study to determine whether the Uniform Trust Code should be enacted in California, in whole or in part."[82]

Social Security Number Disclosure Requirement in Probate Code[83]

Attorneys Peter Stern and Jennifer Wilkerson shared a concern about Probate Code Section 1841, which requires that the conservatorship petition include the social security number of the proposed conservatee if that person is an absentee. Mr. Stern further indicated that social security numbers are generally not used in any non-confidential pleadings or filings. The staff, in reviewing the issue, found another section of the Probate Code (§ 3703), which requires a social security number of an absentee to be included in a court filing.

The State Bar Trusts and Estates Section may be in a position to address this matter more expeditiously.

77. See full analysis in Memorandum 2013-54, p. 27.
78. First Supplement to Memorandum 2012-5, Exhibit p. 12.
79. *Id.* at 12-13.
80. *Id.* at 13.
81. See full analysis in Memorandum 2013-54, pp. 32-33.
82. *Id.* at Exhibit p. 36.
83. See full analysis in Memorandum 2014-41, pp. 26-29.

During the past year, the Commission received several new topic suggestions from various sources. Most of those suggestions are discussed below. A few suggestions do not warrant discussion in this memorandum, because they clearly are a poor fit for the Commission's expertise, or obviously should be resolved by elected representatives rather than Commission appointees.

Common Interest Developments

The Commission has received one letter suggesting study topics that fall within the Commission's existing authority to study Common Interest Development law.[84] The Commission regularly receives such suggestions. Our standard practice is to add them to a list of topics for possible future study. This year's topics will be added to the list.

Probate Code

The Commission received two new suggestions that appear to fall within the Commission's existing authority to study the Probate Code.

Certified Copy of Affidavit for Real Property of Small Value

Attorney Joseph M. Lisi requests a change to Probate Code Section 13202, which pertains to affidavits for real property of small value.[85] This section falls within a chapter of the Probate Code providing simplified procedures for obtaining title to a decedent's real property where the interest is of small value. The procedure is essentially as follows:

- File an affidavit in the superior court, as specified in Probate Code Section 13200.
- The Court Clerk, upon determining that the affidavit is complete and has the required attachments, shall issue a certified copy *without the attachments*.
- The certified copy of the affidavit may then be recorded in the office of the County Recorder where the real property is located.

Mr. Lisi is concerned that the certified copy of the affidavit that must be recorded will not contain the legal description and the assessor's parcel number

84. Email from Duncan McPherson to Brian Hebert (Apr. 7, 2015) (on file with the Commission).
85. See Exhibit pp. 3-5.

of the property, which, he indicates, are included as attachments to the affidavit.[86] The Judicial Council form entitled *Affidavit re Real Property of Small Value (*DE-305)[87] specifies that the legal description and APN be "provided on an attached page labeled Attachment 5a, 'Legal Description.'"

The inclusion of the property description as an attachment to the affidavit seems at odds with Probate Code Section 13200, which specifies that the *affidavit* must state "[a] legal description of the real property and the interest of the decedent therein."[88] In accordance with this provision, the property description would presumably be part of the affidavit itself and thus included in the certified copy.

Mr. Lisi's concern arises from the difference between the Probate Code and the Judicial Council form in the treatment of attachments to the affidavit. Probate Code Section 13202 specifies that attachments are *not* included in the certified copy. In contrast, the Judicial Council form provides that the certified copy prepared by the court clerk *includes* "any attached notary acknowledgements and any attached legal description of the property (but exclud[es] other attachments)."

While the Judicial Council form appears to require the proper result (i.e., the certified copy includes the property description), the inconsistency between Section 13202 and the Judicial Council form regarding attachments could cause confusion. The source of potential confusion is the Judicial Council form, which designates the property description as an "attachment" and treats that attachment in a manner that is at odds with the treatment of attachments prescribed by statute. The Commission has no role in preparing or amending Judicial Council forms. **As such, the staff recommends referring this issue to Judicial Council for resolution.**

Revocability of Trusts by Surviving Co-Trustee & Disposition of Trust Assets

Attorney Beverley Pellegrini writes to request statutory clarification as to the meaning of the "joint lifetimes of the trustors" when that phrase is used in trust documents.[89] In particular, Ms. Pellegrini believes that the phrase is ambiguous

86. See *id.* at 3-4.
87. As revised July 1, 2015.
88. Probate Code § 13200(a)(3). Section 13200 separately requires certain items to be "attached" to the affidavit. See Probate Code § 13200(c) (inventory and appraisal of decedent's real property in California), (d) (copy of the will, if relevant), (e) (certified copy of decedent's death certificate).
89. Exhibit pp. 28-29.

as it could mean either the time period when *all* trustors are alive (i.e., until the first trustor dies) or the time period when *any* trustor is alive (i.e., until all trustors are deceased).[90] Further, Ms. Pellegrini indicates that "[i]t is clear from many conversations with attorneys, that joint lifetimes of the trustors, joint lifetimes of either trustors, or the joint lifetime of the trustors is interpreted different ways at different times. This misuse of language results in decisions that cannot add clarity to the law."[91] In reviewing a number of legal resources, the staff likewise found that similar "joint lifetimes" phrases do indeed appear to be subject to different interpretations.[92]

Ms. Pellegrini suggests that "[a]dding a definition of terms will go a long way to avoid the failings of careless drafting and will allow the parties to fix their documents should they fall prey to careless drafting."[93]

At its core, Ms. Pellegrini's concern relates to the ability of co-Trustors to achieve their intended result during the survivorship period (i.e., after the first Trustor is deceased) with respect to both the revocation and disposition of trust property. For instance, should a marital trust that provides for revocability during the "joint lifetimes" of the Trustors permit the surviving spouse to revoke as to the entire property or only that spouse's share of the property?[94] To the extent that the surviving spouse has the power to revoke the entire trust corpus, does that spouse also control the disposition of that property?[95]

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90. *Id.* at 28.

91. *Id.*

92. Compare Charles A. Larson, *Revocation and Amendment, in* Drafting California Revocable Trusts, v. 2, § 20.3, at 683-686 (Cal. Cont. Ed. Bar, 4th ed.) ("joint lifetimes" end when first person dies) with Barron's Law Dictionary (Stephen H. Gifis, ed., 3d ed., 1991) ("joint lives" end when all persons are deceased).

93. *Id.* at 29.

94. Generally, the answer to this question would be determined according to Probate Code Section 15401. In relevant part, that section reads:

> (b) (1) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code [which permits either spouse to unilaterally revoke the trust as to community property while both spouses are living].
>
> (2) Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.

95. Generally, the answer to this question would be determined according to Probate Code Section 15410. In relevant part, that section reads:

> At the termination of a trust, the trust property shall be disposed of as follows:

While the specific request from Ms. Pellegrini (a statutory definition for "joint lifetimes") is a narrow one, the issues that Ms. Pellegrini's request implicates are somewhat unsettled and complex, having been the subject of recent legislation.

In 2012, in response to a series of recent cases, the Executive Committee of the Trusts and Estates Section of the State Bar (hereafter, TEXCOM) sponsored legislation to clarify the revocability and disposition of trust property during the survivorship period. That legislation was enacted.[96]

Some commentators have suggested that the intent and effect of the 2012 legislation is unclear.[97] The staff, having reviewed the issue, believes that this area of law could benefit from additional clarification.

Regardless, the staff does not anticipate having the resources to work on this issue in 2016. **The staff recommends that the Commission retain the topic for future consideration once the Commission's workload eases.**

Technical and Minor Substantive Statutory Corrections

The Commission has received two suggestions that might fall within the Commission's existing authority to study technical and minor substantive statutory corrections.

(a) In the case of a trust that is revoked by the settlor, the trust property shall be disposed of in the following order of priority:
(1) As directed by the settlor.
(2) As provided in the trust instrument.
(3) To the extent that there is no direction by the settlor or in the trust instrument, to the settlor, or his or her estate, as the case may be.
(b) In the case of a trust that is revoked by any person holding a power of revocation other than the settlor, the trust property shall be disposed of in the following order of priority:
(1) As provided in the trust instrument.
(2) As directed by the person exercising the power of revocation.
(3) To the extent that there is no direction in the trust instrument or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate, as the case may be.
….

96. See 2012 Cal. Stat. ch. 55 (AB 1683 (Hagman)).

97. See generally CEB, 34 Estate Planning & California Probate Reporter 37-39 (August 2012); see also *id.* at 39 ("[T]he amended statute is apparently intended to permit a surviving spouse to alter the disposition with respect to the deceased spouse's share of trust property whenever that portion of the trust is not expressly made irrevocable and the trust does not manifest a contrary intent in some other way. However, the statute does not clearly accomplish that purpose. The statute also may have unintended or uncertain application to living settlors and unrelated settlors.").

Bond and Undertaking Law

Attorney Frank Coats is concerned that recent changes to California's Bond and Undertaking Law do not adequately account for the operation of the law in non-litigation matters.[98] In particular, Mr. Coats identifies several specific statutory changes that complicate the application of the statute to bonds and deposits required as a condition of a license or permit.[99]

Generally, the Bond and Undertaking Law applies to "a bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any statute of this state."[100] Among other things, the scope of this law includes both bonds given in an action or proceeding and bonds required as a condition of a license or permit.[101]

The Bond and Undertaking Law authorizes the deposit of certain financial instruments in lieu of giving a bond.[102] In 2014, legislation[103] was enacted to "update[]the list of financial instruments that may be deposited with the court in lieu of an appeal bond to stay execution of a judgment pending appeal."[104]

Perhaps the most troubling issue raised by Mr. Coats is that the 2014 amendments could be read to only permit the use of bonds or notes as a deposit in lieu of an appeal bond. The relevant provisions of the Code of Civil Procedure are reproduced below:

> 995.710. (a) Except as provided in subdivision (e) or to the extent the statute providing for a bond precludes a deposit in lieu of bond or limits the form of deposit, the principal may, without prior court approval, instead of giving a bond, deposit with the officer any of the following:
>
> …
>
> (2) Bonds or notes, including bearer bonds and bearer notes, of the United States or the State of California. *The deposit of a bond or note pursuant to this section shall be accomplished by filing with the court, and serving upon all parties and the appropriate officer of the bank holding the bond or note, instructions executed by the person or entity holding title to the bond or note that the treasurer of the county where the judgment was entered is the custodian of that account for the purpose of*

98. Exhibit pp. 1-2.
99. *Id.*
100. Code Civ. Proc. § 995.020(a); but see *id.* § 995.020(c) (the Bond and Undertaking Law does not apply to bail bonds).
101. See *id.* § 995.140(b).
102. Code Civ. Proc. § 995.710.
103. 2014 Cal. Stat. ch. 305 (AB 1856 (Wilk)).
104. Assembly Floor Analysis of AB 1856 (Jul. 31, 2014), p. 2.

> *staying enforcement of the judgment, and that the title holder assigns to the treasurer the right to collect, sell, or otherwise apply the bond or note to enforce the judgment debtor's liability pursuant to Section 995.760.*
> …[105]

The italicized language shown above was added by the 2014 legislation. The staff reviewed the bill analyses and found no evidence that the legislation was intended to preclude the deposit of bonds or notes in lieu of a bond required as a condition of a permit or contract.

This appears to be a narrow issue of clarification, which the Commission would be well-suited to address. **The staff recommends that the Commission retain the topic for future consideration once the Commission's workload eases.** If Mr. Coats wants to pursue this matter more expeditiously, perhaps the California Conference of Bar Associations, the sponsor of the 2014 legislation, would be in a position to address the issue.

In addition, Mr. Coats identifies a few provisions in the current law that may cause confusion.[106] The staff concluded that these issues, on their own, do not appear to justify undertaking a Commission study. However, these issues would be appropriate to address if the Commission chooses to work on the issue discussed above.

Timing Rules for Service by Mail and Email

Attorney Joshua Merliss expresses concern about differing judicial interpretations of the rules governing the timing of service by mail (Code Civ. Proc. § 1013) and service by email (Code Civ. Proc. § 1010.6(a)(4)).[107] Each provision extends litigation deadlines, notice periods, and the like for a certain number of days after service occurring by the specified means (mail or email).[108]

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105. Emphasis added.
106. See Exhibit pp. 1-2; see also Email from Frank Coats to Brian Hebert (Sept. 16, 2015) (on file with the Commission).
107. Exhibit pp. 6-27.
108. The relevant part of Section 1013 states:

> 1013. (a) In case of service by mail, … [s]ervice is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States….

However, the statutes do not expressly say who can take advantage of the extension of time. Mr. Merliss asks the Commission to "amend these statutes to clearly and plainly state the intent of the statute, to provide the extra time to the party served and no other party."[109]

With respect to who is entitled to an extension of time, Mr. Merliss indicates that two appellate courts have reached differing conclusions.[110] The decisions he cites are *Westrec Marina Management v. Jardine Ins. Brokers Orange County*[111] and *Kahn v. The Dewey Group*.[112]

In *Westrec*, the Fourth District Court of Appeal reviewed the legislative history of Section 1013 and determined that the five-day extension of time for service by mail operates only to the benefit of the *recipient* of that service.[113] In the more recent *Kahn* case, the Second District Court of Appeal concluded, based on the plain language of Section 1010.6, that the two-day extension of time for service by email operates to the benefit of the *party who serves* the document by email.

Given the similarities between Sections 1010.6 and 1013, the differing interpretations described above seem problematic and potentially confusing. Addressing this issue would clarify the applicable deadlines and help to avoid inadvertent late filings, which could have significant legal consequences.

This type of issue appears to be one that the Commission is well-suited to address. **The staff recommends that the Commission retain the topic for future consideration as a carryover topic.**

If Mr. Merliss wants to pursue this matter more expeditiously, perhaps the Litigation Section of the State Bar would be in a position to address the issue.

The relevant part of Section 1010.6 states:

> 1010.6. (a)…
> (4) Electronic service of a document is complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent. However, any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days.…

109. Exhibit p. 7.
110. *Id.* at 6-7.
111. 85 Cal. App. 4th 1042, 102 Cal. Rptr. 2d 673 (2000).
112. 240 Cal. App. 4th 227, 192 Cal. Rptr. 3d 679 (2015); see also Exhibit pp. 8-27.
113. See 85 Cal. App. 4th at 1049 ("This legislative history supports the conclusion that the extension of time applies only to the party served."); see also generally *id.* at 1047-1050 (finding that Code of Civil Procedure Section 1013(a) did not operate to extend 60-day limit for granting motion for new trial).

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2016. Traditionally, the Commission's highest priority has been assisting with legislation to implement recently-completed Commission recommendations. That activity typically consumes substantial staff resources, but requires little of the Commission's time.

The highest priority for study work has been matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to studies for which a consultant has delivered a background report, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

To summarize, the traditional scheme of priorities for Commission work is:

(1) Managing the Commission's legislative program.
(2) Studies assigned by the Legislature and other matters the Commission has concluded deserve immediate attention.
(3) Studies for which the Commission has an expert consultant.
(4) Studies that have been previously activated but not completed.
(5) New topics that appear appropriate for the Commission to study.

In addition, the Commission staff and student employees[114] typically address technical and minor substantive issues within the Commission's authority as resources permit.

This priority scheme has worked well over the years. The staff recommends that the Commission continue to follow it in 2016, as detailed below.

Legislative Program for 2016

In 2016, the Commission's legislative program **will likely include legislation on all of the following topics:**

- Deadly Weapons: Minor Clean-Up Issues
- Fish and Game Law: Technical Revisions and Minor Substantive Improvements

114. Minutes (Apr. 2015), p. 3.

- Trial Court Unification: Publication of Legal Notice
- Resolution of Authority

Managing this legislative program will consume some staff resources in 2016 but should not require much attention from the Commission.

Legislative Assignments and Other Matters Deserving Immediate Attention

The Legislature has just directed the Commission to undertake a new study on transfer on death deeds. There is a deadline for completion of that work. While a legislative assignment with a deadline is a high priority, this study cannot be undertaken in earnest until the law has had some time to operate. **Thus, the staff anticipates some initial staff work in 2016, but this issue should not require much attention from the Commission next year**.

The Commission's active study on the recognition of foreign and tribal court money judgments is a legislative assignment with a deadline for completion of January 1, 2017. To ensure that work on this issue is complete by the deadline, **the study on recognition of judgments should continue to be a priority for the Commission in 2016.**

The Commission should also **continue its work on the other three legislative assignments for which work is ongoing:** (1) state and local agency access to customer information from communications service providers, (2) fish and wildlife law, and (3) the relationship between mediation confidentiality and attorney malpractice and other misconduct.

If resources permit, the Commission should also return to its legislatively-mandated study of trial court restructuring. The Commission should continue to make progress on bringing this huge project to an end.

Projected Completion of Active Studies

In conjunction with the Commission's consideration of the 2015 New Topics memorandum, the Commission asked the staff to provide projected study completion timelines.[115] In Memorandum 2014-53, the staff provided a chart with the timelines for the active studies. As discussed in that memorandum, the projected study completion dates are hard to predict for a number of different reasons.[116]

115. See Minutes (Oct. 2014), p. 3; see also Memorandum 2014-53.
116. See generally Memorandum 2014-53; see also *id*. at pp. 1-4 (discussing factors that can affect study progress generally).

Similarly, the staff has attached a chart entitled "Projected Completion of Active Studies" to this memorandum. As indicated in the chart, the current active legislative assignments are projected to largely consume the Commission's staff resources in 2016.[117]

Would the Commission like the staff to prepare a similar Projected Completion of Active Studies chart in conjunction with the New Topics memoranda as a matter of practice going forward?

Consultant Studies

For some studies, the Commission has the benefit of a consultant's assistance. In particular, the Commission is fortunate to have Mr. Sterling's extensive background study on *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (June 2010). The Commission began this work in 2013, but had to put it on hold due to other higher priority work. **The Commission should return to this topic as soon as its resources permit.**

The Commission also has background studies on the following topics, which it has already studied to some extent:

- Common interest development law (background study prepared by Prof. Susan French of UCLA Law School).
- Civil discovery (background study prepared by Prof. Gregory Weber of McGeorge School of Law).
- Review of the California Evidence Code (background study prepared by Prof. Miguel Méndez of Stanford Law School and UC Davis School of Law).

The Commission is unlikely to have time to begin new work in these areas in 2016, but it should turn back to them when resources permit.

Other Activated Studies

The Commission has previously activated studies on two topics: attorney's fees and presumptively disqualified fiduciaries. Those studies are currently on hold, and it is unlikely that the Commission will have resources available to reactivate either of them in 2016. They should be addressed when time permits.

117. Exhibit p. 30.

New Topics

Aside from the matters discussed above, the Commission almost certainly will not be able to commence any new studies this year. The staff regrets that the Commission's resources are so limited and it is unable to promptly address all of the topics that could benefit from its attention.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2016 would include:

- Manage the 2016 legislative program.
- Begin laying the groundwork for the study of revocable transfer on death deeds.
- Continue with the study on recognition of tribal and foreign money judgments.
- Continue the study on state and local agency access to customer information from communications service providers.
- Continue the study on fish and wildlife law.
- Continue the study on the relationship between mediation confidentiality and attorney malpractice and other misconduct.
- As resources permit, pursue smaller projects addressing technical or minor substantive statutory reforms, particularly if suitable for student work.
- If resources permit, continue the study on trial court restructuring.
- If resources permit, resume work on creditor claims against nonprobate assets, focusing on the issue previously identified for initial study.

Respectfully submitted,

Kristin Burford
Staff Counsel

EMAIL FROM FRANK COATS
(6/11/15)

Brian:

Hope all is going well at CLRC

Apologies for the delay in getting back to you on this.

These comments are made my me personally, and are not an act of my employer, the Department of Motor Vehicles. I am, and have been for the past ten years or so, the attorney at DMV primarily responsible for advising on bonds and deposits given as a condition of issuance or renewal of license or permit, and have made a study of the Bond and Undertaking Law in connection with that work. The amendments of section 995.710 in statutes of 2014 chapter 305 (AB 1856) have created problems for me in applying the statute

Amendments of section 995.710 of the Civil Code of Procedure by statutes of 2014 chapter 305 (AB1856) made the applicability of some provisions to deposits given in connection with the issuance of license or permit problematic, and, created some other problems.

1. At subdivision (a) of section 995.710, reference to made to "without prior court approval." Give that this statute covers license and permit bonds and contract bonds, the reference to "without prior court approval" is confusing in that it implies that a court is somehow involved; and does not deal with the possibility that approval by the agency on a license of permit deposit might be required.

2. At subdivision (a)(1) of section 995.710, the amendment added a cashier's check as an acceptable form of deposit, in addition to lawful money of the United States. This is confusing because a check is merely a way of moving money, not money itself. The check itself is not a form of deposit for purposes of 995.710, so far as I know. Providing that the check is a form of deposit suggests that it is not to be cashed, but instead is to be held uncashed. In bid bonds the check itself is treated as the deposit, and the check is not cashed but returned to the bidder, if it is not used. In the context of 995.710, the deposit must be invested in an interest bearing account, making clear that the cashier's check must be cashed, and that therefore the check is really not a form of deposit at all. Also see Government Code 6157(b), which already provides generally that a check must be accepted as payment of a trust deposit; and, further provides that acceptance of the check is payment of the amount owed as of the date accepted, but not until the check clears the bank. That is, because of section 6157, the amendment of 995.710(a)(1) was not necessary at all. Courts were already obligated to accept checks as to convey money as deposit in lieu of bond; and, the deposit made by check would be treated as made on the date the check was accepted, once the check cleared the bank.

2. At subdivision (a)(2) of section 995.710, the subdivision is amended so that, as written, deposits of bonds or notes of the State of California or the United States are not acceptable for license or permit deposits, or for contract deposits; but, only for deposits given in an action or proceeding.

What appears to have happened, and this is supported by the committee hearing documents available on the Legislative web site, is that litigating lawyers were having

trouble getting courts to accept checks to convey money to serve as deposit in lieu of bond. Then, without considering the interests of that part of the community who work with license and permit bonds, altered the law to require the acceptance of checks and clarify how the giving of bonds or notes to the court in an action and proceeding works. Garbling the law in the process.

The California Bond and Undertaking Law ("BUL"), chapter 2 (commencing with section 995.010) of title 14 of part 2 of the Civil Code of Procedure, as added by statutes of 1982 chapter 998 (AB 2751), and its companion law statutes of 1982 chapter 517 (AB 2750), were drafted by the CLRC at the request of the legislature, and therefore the CLRC has particular expertise, experience, and perhaps interest in seeing that the law remains well written.

Please feel free to contact me if further discussion would be helpful.

Frank Coats

J. M. LISI
Attorney at Law
10909 Meadow Glen Way E
Escondido, California 92026-7004

(760) 297-1428
Joe@Li.si

June 15, 2015

Via email

Dear Ms. Larrabee:

I have been a member of the California bar for a number of years, and a member of the Probate etc. Section thereof for most of that time.

About four or five years ago, I contacted the chairman of said Section with a recommendation that he contact your offices with a view toward making a minor change to PC §13202 with reference *Affidavits For Real Property of Small Value*. Ultimately, three different Section members got involved, with the last one suggesting a much more complicated solution than that which I had suggested. I agreed with his approach, thinking anything would be better than §13202 as written. [See attachment.] I have heard nothing more from these people since, and decided to contact you directly.

Paragraph 5a of the Affidavit referred to in §13202 requires that the legal description and APN of the subject property be "provided on an attached page labeled Attachment 5a - Legal Description".

The provisions of §13202 require that, after filing the Affidavit and attachments, the (probate) court clerk "shall issue a certified copy of the affidavit **without the attachments**". [Emphasis added.] It further provides in §13202 that the certified copy [presumably without the attachment describing the subject property] shall be recorded with the appropriate county recorder.

I think you will agree that it is really silly to record a document purporting to affect title to a parcel of real property that is not even described in the document. Clearly, such a recording is an idle act.

I respectfully suggest that §13202 be changed to add the following after the (probate) court clerk "shall issue a certified copy of the affidavit without the attachments":

other than the legal description Attachment 5a

and that the second sentence of §13202 be augmented to begin with the following:

The certified copy with the legal description Attachment 5a shall be recorded in the office of the county recorder etc.

The attachment hereto also sets forth the provisions of LASC Local Rule 4.45 that was adopted in 2011. Perhaps you will have to contact their good offices to learn of their wishes as to whether the "Statement of relationship and entitlement" should also be recorded with the Affidavit. I would think not.

You might note that, after a third try [failure to include zip code of undeveloped land on cover sheet; failure to include Local Rule 4.45 "Statement of relationship and entitlement"], I just received a certified copy of an Affidavit from the L.A. court clerk – *with all attachments* firmly in place.

Respectfully submitted,

Joseph M. Lisi, Esq.
SBN 35658

JML:me
Attachment

J. M. LISI
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10909 Meadow Glen Way E
Escondido, California 92026-7004
(760) 297-1428

June 13, 2015

Probate Code Section 13202 [Emphasis added.]

13202. Upon receipt of the affidavit and the required fee, *the court clerk,* upon determining that the affidavit is complete and has the required attachments, shall file the affidavit and attachments and *shall issue a certified copy of the affidavit* ***without the attachments***.

The ***certified copy*** *shall be recorded in the office of the county recorder* of the county where the real property is located. The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

LASC Local Rule 4.45 [Emphasis added.]

4.45 AFFIDAVITS FOR REAL PROPERTY OF SMALL VALUE
When an Affidavit for Real Property of Small Value is filed pursuant to Probate Code section 13200, one of ***the following must be attached to the affidavit:***
(a) Decedent Died Testate. If the decedent died testate, a statement that the decedent died testate and an executed copy of the will; or
(b) Decedent Died Intestate. If the decedent died intestate, ***a statement*** identifying the relationship of the heir(s) ***which establishes the affiant's claim to entitlement.***
(Rule 4.45 new and effective July 1, 2011)

EMAIL FROM JOSHUA MERLISS
(9/10/15)

Dear Senate Judiciary Committee and California Law Revision Commission:

Attached, please find Court of Appeal opinion in the case of Kahn v. The Dewey Group, et al.

California Code of Civil Procedure section 1013 was enacted in 1872. It is my understanding that this statute was enacted, in part, to allow a party served by mail with documents an extra 5 days to respond to the documents because of delays in the delivery of mail.

However, the statute was poorly written. The statute contains the following language:

"**Service is complete at the time of the deposit** (in the mail), **but** any period of notice and **any right or duty to do any act** or make any response within any period or on a date certain after service of the document, **which time period or date is prescribed by statute or rule of court, shall be extended 5 calendar days**…."

One court found the statute to be ambiguous and determined that the extension to act was only for the benefit of the party receiving the document.

In Kahn, the Court read the statute as not only providing the extra days to act to the person receiving the document but also to the person serving the document. The Court focused on the part of the statute that provides "any right or duty to do any act" is extended. The Kahn Court read the statute literally and correctly according to the wording of the statute. However, that was not the intention of the statute when written in, I believe, 1872.

The Kahn opinion was published. The application of this statute sanctioned by the Kahn Court will have a widespread ripple effect causing much confusion, will probably clash with other statutes and rules of court requiring the filing of documents on a date certain, and will lead to absurd results.

For example, assume a lawyer missed a filing deadline by 3 days. According to the holding in Kahn, the lawyer may be able to file his or her document 3 days late but serve it by mail gaining an extra 5 days making the late filing timely.

The Westrec court, referenced in the Kahn opinion, looked at the legislative history of the statute, 1013, and determined that the intent was to provide the extra time to respond or do any act only to the party receiving the document and not to the party serving the document.

1010.6 was enacted in 1999 and mirrors the language in 1013. The Kahn case involved the application of 1010.6 and the legislative history of 1010.6 is silent on this issue.

The Kahn court properly deferred to the legislature and interpreted the statute literally.

Surprisingly, since 1013 is such an old statute, the only two cases found dealing with this issue are Westrec and now Kahn. Each court came to a different conclusion. These statutes are involved any time a lawyer serves documents requiring a response on another lawyer.

As such, it is now up to you to amend and clarify the statute so that the intent is supported by the plain language of the statute and it would appear that the Kahn court has invited you to do just that.

I hope this has been helpful and if you agree with my understanding of these statutes, please amend these statutes to clearly and plainly state the intent of the statute, to provide the extra time to the party served and no other party. The Kahn decision has exposed a loophole in the language of the stature that should be fixed.

If you need anything further, please feel free to call or email.

Thank you

Joshua Merliss

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BRIAN KAHN,

Plaintiff and Appellant,

v.

THE DEWEY GROUP, et al.,

Defendants and Respondents.

B259679

(Los Angeles County
Super. Ct. No. BC454443)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth White, Judge. Reversed in part and otherwise affirmed.

Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, Roger L. Gordon and Joshua M. Merliss, for Plaintiff and Appellant.

Lewis, Brisbois, Bisgaard & Smith, Peter L. Garchie, Ruben Tarango and James P. McDonald, for Defendants and Respondents.

Plaintiff Brian Kahn sued 20 defendants he alleged were jointly and severally liable for causing him to suffer personal injury. Prior to trial, all 20 defendants jointly made a Code of Civil Procedure section 998[1] offer to settle Kahn's action for $75,000. Kahn did not accept the offer. Subsequently, the trial court granted a nonsuit as to 14 of the 20 defendants (hereafter, the dismissed defendants), and judgment was entered as to them. The case against the remaining six defendants went to a jury, but the jury was unable to reach a verdict and the trial court granted a mistrial. A retrial currently is pending.

Section 998 provides, among other things, that if a plaintiff fails to accept a defendant's settlement offer and fails to obtain a more favorable judgment, the court may require the plaintiff to pay the defendant's reasonable expert witness fees. (§ 998, subd. (c)(1).) Pursuant to this provision, the 14 dismissed defendants filed a memorandum of costs seeking, among other things, expert witness fees of $206,090 pursuant to section 998. The dismissed defendants asserted that defendants collectively had incurred nearly $300,000 in expert witness fees, and urged that they were entitled to recover 14/20ths (70 percent) of that total.

Kahn moved to strike or tax costs on the ground that a final judgment had not yet been entered against all 20 of the defendants on whose behalf the section 998 offer had been made, and thus the dismissed defendants could not yet recover expert witness fees. The trial court denied the motion to strike or tax costs, and it awarded the dismissed defendants expert witness fees. Kahn appealed.

We reverse the award of expert witness fees. If multiple defendants jointly make an offer to settle pursuant to section 998, whether the offer exceeds the judgment cannot be determined by comparing it to a judgment (or judgments) entered against only *some* of the offering defendants. Instead, the offer must be compared to the judgment(s) obtained against *all* defendants. Accordingly, because in the present case no judgment has yet

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[1] All subsequent undesignated statutory references are to the Code of Civil Procedure, and all rule references are to the California Rules of Court.

been entered with regard to six of the 20 defendants on whose behalf the section 998 offer was made, the trial court erred in awarding expert witness fees to the 14 dismissed defendants.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Complaint

Kahn filed the present action on February 3, 2011, and filed the operative second amended complaint on August 15, 2011. The second amended complaint alleged that from 1996 to 2011, Kahn was a resident of a mobile home park located in San Fernando, California. Sometime prior to 1996, defendants and their predecessors-in-interest had used the land on which the mobile home park sat as an industrial waste disposal site. As a result, the property released hazardous gases to which Kahn had been exposed, causing him to suffer various injuries.

II.

Defendants' Section 998 Offer

In September 2013, all 20 defendants jointly made a statutory offer to compromise pursuant to section 998.[2] Section 998 provides that any party "may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated." (§ 998, subd. (b).) If the offer is accepted, the court "shall enter judgment accordingly." (*Id.*, subd. (b)(1).) If the offer is *not* accepted prior to trial or within 30 days after it is made, whichever occurs first, "it shall be deemed withdrawn." (*Id.*, subd. (b)(2).)

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[2] The 20 defendants on whose behalf the offer to compromise was made are: (1) The Dewey Group; (2) Storage Etc., LLC; (3) B Mortgage Acceptance Corp.; (4) Sky Terrace Investors, LLC; (5) SE Sky Terrace, LLC; (6) SE Sky SPE, LLC; (7) Storage Etc. Manager, LLC; (8) Angelo Capital Realty, LLC; (9) Laurent Opman; (10) Laurent Opman Living Trust; (11) Bruce Rothman; (12) Rothman-Kaye Family Trust; (13) Barbara Andrea Kaye; (14) Sky Dewey, LLC; (15) John Dewey; (16) Dewey Family Trust; (17) Rebecca Dewey; (18) Dewey-Koar, LLC; (19) SE Lopez 1, LLC; and (20) Greg Houge.

Here, defendants' offer, characterized as a "joint offer of judgment," provided that defendants "jointly shall pay Brian Kahn the sum of $75,000 in full and final satisfaction of all monetary claims, including all claims for attorneys' fees and costs," with all parties bearing their own costs and attorneys' fees. Kahn did not accept the offer.

III.

Trial and Judgment

Trial commenced in March 2014. On May 1, 2014, the trial court granted a nonsuit as to 14 defendants.[3] The court entered a judgment of dismissal as to those defendants on June 3, 2014, and the dismissed defendants electronically served notice of entry of judgment on June 9, 2014.

The case against the remaining six defendants (Storage Etc., LLC; SE Sky Terrace, LLC; SE Sky SPE, LLC; Storage Etc. Manager, LLC; Angelo Capital Realty, LLC; and Sky Dewey, LLC) went to the jury on May 6. After six days of deliberation, the jury advised the court it was deadlocked, and the court declared a mistrial. A retrial of the case against the six defendants remains pending.

IV.

The Dismissed Defendants' Memorandum of Costs and Kahn's Motion to Strike or Tax Costs

On June 26, 2014, the 14 dismissed defendants filed a memorandum of costs, which was superseded by an amended memorandum of costs filed later the same day. The amended memorandum of costs asserted that the 20 defendants collectively had incurred costs of $358,341, of which the 14 dismissed defendants were seeking 70 percent (14/20ths), or $250,838. Among the costs the dismissed defendants claimed

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[3] The 14 dismissed defendants are the Laurent Opman Living Trust; Rothman-Kaye Family Trust; Dewey Family Trust; Laurent Opman; Bruce Rothman; John Dewey; Rebecca Dewey; Barbara Andrea Kaye; Greg Houge; B Mortgage Acceptance Corp.; Sky Terrace Investors, LLC; SE Lopez 1, LLC; Dewey-Koar, LLC; and The Dewey Group.

were expert witness fees of $206,090, described as 70 percent of the total incurred expert witness fees of $294,415.

Kahn filed a motion to strike or tax costs. He contended that (1) the memorandum of costs was not timely served, and (2) the dismissed defendants were not entitled to recover expert witness fees under section 998 because no judgment had yet been entered as to six of the defendants who had served the offer to compromise. As to the second issue, Kahn explained as follows: "For example, one of the Defendants who joined in the 'Offer to Compromise' was SE Sky Terrace, LLC, the landowner. SE Sky Terrace, LLC, was not dismissed by the Court. If Plaintiff obtains a more favorable judgment against SE Sky Terrace, LLC at retrial than the amount offered in the joint 'Offer to Compromise,' Plaintiff would be the prevailing party against SE Sky Terrace, [LLC] and Defendants would not be entitled to augmented costs pursuant to CCP 998. [¶] If Defendants wished to send out valid offers that would have avoided this situation, they should have sent out individual offers from each separate Defendant. [¶] Since the offer was made jointly, the only way Defendants may recover augmented costs pursuant to Code of Civil Procedure section 998 is to obtain a defense verdict for all of the joint offerors. Since that has not occurred, the 'Offer to Compromise' is legally ineffective and Defendants are not entitled to augmented costs including the costs of expert witnesses."

The dismissed defendants opposed the motion. They asserted that both prior to and during trial, defense counsel attempted to obtain dismissal of the 14 dismissed defendants on the ground that there was no colorable claim against them. After a nonsuit was granted in their favor, the dismissed defendants sought costs, including expert witness fees, premised on the section 998 offer served September 20, 2013. The dismissed defendants contended the costs memorandum was timely served and Kahn did not object to any particular item of costs. As to Kahn's contentions that the offer to compromise was ineffective or the request for expert witness fees was premature, the dismissed defendants urged that California law permits joint offers if defendants are "united in interest and were sued on a theory of joint and several liability" or "it is

possible to determine whether a more favorable judgment was received as to each defendant." In the present case, the joint section 998 offer was valid and enforceable because Kahn alleged all defendants were jointly and severally liable and "[a]ny subsequent trial involving the remaining Defendants would not change the result achieved by the dismissed Defendants, which was a judgment of dismissal entered in their favor."

V.

Order Denying Motion to Strike or Tax Costs

The trial court denied Kahn's motion to strike or tax costs. The court found that (1) the dismissed defendants' costs memorandum was timely filed, and (2) the 14 dismissed defendants were entitled to recover their expert witness fees. The court reasoned as follows:

"[I]t appears that this CCP § 998 offer was made on behalf of all [Defendants] jointly for the sum of $75,000 to Plaintiff. The fact that six of the Defendants included on the CCP § 998 offer remain in the case pending retrial does not render the offer invalid. This joint offer was valid because the Defendants were alleged to be jointly and severally liable (at least for economic damages under Proposition 51) and also because the offer of joint liability imposed upon each Defendant the risk of being [jointly liable] for non-economic damages under Proposition 51. . . .

"Because Plaintiff failed to obtain a more favorable judgment or award as against the above dismissed Defendants, they are entitled to recover all post-offer costs, plus all expert witness fees actually incurred and reasonably necessary, before and after the settlement offer in the court's discretion. Thus, the fact that Defendants may have claimed costs for all of their expert witness fees from the inception of the case is not improper.

"As to Plaintiff's claim that if he obtains a more favorable judgment than the $75,000 offer at the retrial as against any of the six remaining Defendants, such as SE Sky Terrace, LLC, Defendants are representing to the Court that the amount of expert

witness fees was $294,415.18 and that the $206,090.64 represents an apportionment of those fees for 14 of 20 defendants. . . . [¶] . . . [¶]

"Here, the Court in its discretion will award the dismissed Defendants $206,090.64 in witness fees, which Defendants represent as an apportionment of those witness fees . . . for 14 of 20 defendants. The remaining six defendants are not being awarded their pro rata portion of the expert witness fees."

The dismissed defendants served notice of entry of an amended judgment, which included the award of costs, on October 21, 2014. Kahn timely appealed.

ISSUES AND STANDARD OF REVIEW

This appeal concerns two issues:

(1) Is a memorandum of costs filed 17 days after electronic service of a notice of entry of judgment timely?

(2) When all defendants make a joint pretrial offer to compromise pursuant to section 998, and then judgment is entered in favor of some defendants while the case remains pending against other defendants, can the prevailing defendants recover expert witness fees under section 998?

Because both issues involve the application of law to undisputed facts, our review is de novo. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1018 (*Martinez*); see also *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130 ["The issue of whether a section 998 offer is enforceable, and the application of section 998 to an undisputed set of facts, present questions of law, which we review de novo."].)

DISCUSSION

I.

The Memorandum of Costs Was Timely Filed

A. Background

Rule 3.1700(a)(1) provides in relevant part: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after . . . the date of service of written notice of entry of judgment or dismissal."

Section 1013, subdivision (a) provides that service by mail is complete at the time of deposit in a post office or mail box, "but *any* period of notice and *any* right or duty to do *any* act or make *any* response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California . . . . This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court." (Italics added.)

Section 1010.6, subdivision (a)(4) provides a similar extension of time to file where service of a triggering document is made electronically. It says: "Electronic service of a document is complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent. However, *any* period of notice, or *any* right or duty to do *any* act or make *any* response within *any* period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days. . . . [¶] . . . [¶] This extension applies in the absence of a specific exception provided by any other statute or rule of court." (Italics added.)

In *Nevis Homes LLC v. CW Roofing, Inc.* (2013) 216 Cal.App.4th 353 (*Nevis*), the prevailing defendant filed a memorandum of costs nineteen days after the plaintiff dismissed its complaint and mailed written notice of entry of dismissal. The court held the memorandum of costs was timely: "No statute or rule of court 'specifically' exempts cost memoranda from the five-day mailing extension in section 1013, subdivision (a). Moreover, section 1013, subdivision (a), specifies the items to which the extension does not apply. A memorandum of costs is not among those exceptions. Nor does rule 3.1700 specifically exempt a costs memorandum from the time extension provided by section 1013, subdivision (a). . . . We are not authorized to rewrite the plain language of a statute to conform to an assumed intent that does not appear from the language." (*Nevis*, at p. 357.)

B. Section 1010.6 Extends the Time to File A Memorandum of Costs Under the Facts of the Present Case

Kahn does not contend *Nevis* was wrongly decided or does not apply to electronic service. He urges, however, that section 1010.6 should not apply in the present case because the dismissed defendants filed and served *both* the notice of entry of judgment *and* the memorandum of costs. In other words, Kahn contends that the two-court-day extension of time provided by section 1010.6 is available only to the party on whom notice of entry of judgment is served, *not* to the party that serves such notice.

We are aware of one case, *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042 (*Westrec*), that arguably supports Kahn's contention. *Westrec* considered whether section 1013 extended a trial court's time to grant a motion for new trial where notice of entry of judgment was served by mail. (*Westrec*, at p. 1047.) The Court of Appeal held that section 1013 did not extend the trial court's time to act, concluding, among other things, that section 1013 provides an extension only to "*the person served* by mail." (*Westrec*, at p. 1048, italics added.) In so concluding, the court opined that the relevant statutory language was ambiguous, and the legislative history supported the conclusion that the extension of time provided by section 1013 applied only to the person being served. (*Westrec*, at p. 1049.)

Westrec does not control our analysis in this case. Whatever the Legislature may have intended when it enacted section 1013—an issue we do not reach—the question before us is section 1010.6, not section 1013. Even assuming that the Legislature intended to limit the application of section 1013 to the party being served, nothing suggests it had the same intention nineteen years later when it adopted section 1010.6. Indeed, the legislative history of section 1010.6 is completely silent on this issue.

Moreover, we do not agree with the *Westrec* court that the language of either section 1013 or section 1010.6 is ambiguous or is reasonably susceptible of that court's interpretation. As we have said, section 1010.6, subdivision (a)(4)—like section 1013, subdivision (a)—extends by a specified number of days "*any* right or duty to do *any* act or make *any* response within any period . . . after the service of the document" by

electronic means. (Italics added.) By its plain language, therefore, the statute does not limit the extension to the party on whom a document is served.

Our Supreme Court has cautioned against "reading into a statute language it does not contain or elements that do not appear on its face." (*Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1295 (*Martinez*).) As the court has said, "[i]t is unreasonable to conclude that [the Legislature] intended to require [parties] to comply with [a statute's] express requirements *and* to scour committee reports for other possible requirements not visible in the statutory language. The committee report may not create a requirement not found in [the statute] itself." (*Id.* at p. 1296.) The Supreme Court's analysis has particular force here, where adopting *Westrec*'s analysis would require parties not only to scour the legislative history of section 1010.6, but the legislative history of section 1013 as well.

For all of these reason, we conclude that if the Legislature wishes to limit the two-day extension provided in section 1010.6 to the party being served, it must say so expressly. In light of the expansive language of the statute, we decline to construe it as a trap for the unwary. (*Martinez*, *supra*, 50 Cal.4th at p. 1296; *Corrie v. Soloway* (2013) 216 Cal.App.4th 436, 452.) We therefore conclude that the dismissed defendants' memorandum of costs was timely.

II.

The Trial Court Erred in Awarding the Dismissed Defendants Their Expert Witness Fees

A. Section 998 and the Principles Governing Its Application

Except as otherwise expressly provided by statute, a prevailing party "is entitled as a matter of right to recover costs." (§ 1032, subd. (b).) Recoverable costs generally do not include the fees of expert witnesses not ordered by the court. (§§ 1032, 1033.5, subd. (b)(1).) Such expert witness fees are recoverable in some circumstances, however, when a more favorable judgment for the defendant follows a plaintiff's rejection of a pretrial section 998 settlement offer, thus triggering section 998's cost-shifting provisions. (See *Martinez*, *supra*, 56 Cal.4th at p. 1019 & fn. 3.)

As relevant here, section 998, subdivision (c)(1), provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

"The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.' . . . Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits." (*Martinez*, *supra*, 56 Cal.4th at p. 1019, citations omitted.)

B. Joint Section 998 Offers

On its face, section 998 does not address offers to compromise made by or to multiple parties: It refers to an offer made by "*a* defendant," not by "defendants." (*Id.*, subd. (c)(1), italics added.) It also does not facially address multiple judgments, referring in the singular to "*a* more favorable judgment." (*Ibid.*, italics added.)

Although section 998 thus is silent as to multiple party offers and judgments, courts have held that at least in some circumstances, section 998 can apply to joint offers and/or multiple judgments. The cases have taken at least two approaches to the issues of joint offers and multiple judgments, as we now discuss.

1. The "Absolute Prevailing Party" Approach

In *Winston Square Homeowner's Assn. v. Centex West, Inc.* (1989) 213 Cal.App.3d 282 (*Winston Square*), a homeowner's association sued the developer and subcontractors of a townhouse development for alleged construction defects, including drainage problems. Prior to trial, all defendants jointly made an offer pursuant to section 998 to settle the case for $500,000; the homeowner's association rejected the

offer. (*Winston Square*, at pp. 293-294.) The parties then settled all issues of the lawsuit except for those relating to drainage. (*Id.* at p. 286, fn. 1.)

The trial court bifurcated the trial of the drainage issues and, following a first phase, concluded that all drainage claims were barred by the statute of limitations. (*Winston Square*, *supra*, 213 Cal.App.3d at pp. 286-287.) As relevant here, judgment was entered against the homeowner's association and in favor of Wilsey & Ham (Wilsey), the drainage subcontractor. (*Ibid.*) Wilsey also sought and was awarded its expert witness fees pursuant to section 998. (*Winston Square*, at pp. 293-294.)

The homeowner's association appealed the judgment and costs award. Among the issues it raised on appeal was Wilsey's entitlement to expert witness fees under section 998. (*Winston Square*, *supra*, 213 Cal.App.3d at p. 294.) The homeowner's association contended that because there was never a trial on damages or a judgment for damages against which the joint section 998 offer could be measured, the trial court erred in awarding Wilsey its witness fees. (*Winston Square*, at p. 294.)

The Court of Appeal disagreed, concluding that because Wilsey was an "absolute prevailing party," it was entitled to recover its witness fees under section 998. The court explained: "Joint offers by more than one defendant fall within the provisions of section 998 when defendants are united in interest and are sued on a theory of joint and several liability. (*Brown v. Nolan* (1979) 98 Cal.App.3d 445, 451; see also *Stiles v. Estate of Ryan* (1985) 173 Cal.App.3d 1057, 1066.) Here, all defendants were not united in interest. [Fn. omitted.] Nevertheless, the application of section 998 appears appropriate in this case. Though the joint offer did not break down the offer as to particular areas of damage or defendants, [Wilsey] received a judgment in its favor. [Wilsey] was an *absolute prevailing party*—it was completely absolved of any liability. As [Wilsey] contends, the subsequent settlement between plaintiff and the other defendants on issues other than drainage was irrelevant as far as [Wilsey] was concerned. [¶] The trial court did not err when it allowed [Wilsey] to recover its expert witness fees as costs." (*Winston Square*, at p. 294, italics added.)

2. The "Comparison" Approach

In several cases, courts have adopted an approach to evaluating joint section 998 offers that is very different than *Winston Square*'s "absolute prevailing party" approach. We consider the cases applying this "comparison" approach below.

a. Offers jointly made by plaintiffs

Fortman v. Hemco, Inc. (1989) 211 Cal.App.3d 241 (*Fortman*) involved a section 998 offer jointly made by two plaintiffs. There, a child, Nichole, sustained extensive permanent injuries when she was ejected from her parents' jeep as a result of a defective vehicle door. Nichole and her mother sued several defendants, including Hemco. Prior to trial, Nichole and her mother jointly made an offer to Hemco pursuant to section 998 to settle the case for $1 million; Hemco declined to respond to the offer. (*Fortman*, at p. 262.)

By the time the case went to a jury, as a result of settlements and voluntary dismissals, only Nichole and Hemco remained in the case. (*Fortman*, *supra*, 211 Cal.App.3d at p. 249.) The jury returned a verdict finding Hemco 25 percent liable for Nichole's injuries, and awarded her damages of more than $23 million, of which approximately $17 million was for economic losses and $6 million was for noneconomic losses. (*Id.* at p. 250.) The court entered judgment on the jury verdict and awarded Nichole pretrial interest pursuant to Civil Code section 3291 based on the section 998 offer.[4]

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[4] At the relevant time, Civil Code section 3291 provided: "In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of the other person, corporation, association, or partnership, and whether the injury was fatal or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. [¶] If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

Hemco appealed, contending, inter alia, that the section 998 offer was invalid because it was made jointly by Nichole and her mother. (*Fortman*, *supra*, 211 Cal.App.3d at pp. 262-263.) In support, Hemco cited *Randles v. Lowry* (1970) 4 Cal.App.3d 68 (*Randles*), which held a joint offer a "nullity" because it was made by a defendant to three plaintiffs without designating how it should be divided among them. (*Fortman*, at p. 263.) The *Fortman* court declined to apply *Randles* to conclude that the section 998 offer was ineffective to support the award of prejudgment interest. It explained: "In our case, Hemco would have us apply the rule of *Randles*, that joint offers are a nullity, without examining the reason for the rule. The reason, as both *Randles* and [a subsquent decision] illustrate, is that in those cases it could not be determined after trial whether the individual plaintiffs received more than they would have received had the offer to compromise been accepted. In our case, however, it is absolutely clear that Nichole received a greater amount in damages after trial than she would have received had Hemco accepted the joint offer even if the entire amount of the offer, $1 million, is attributed to her. Nichole's mother dismissed her action, leaving Nichole as the sole plaintiff for purposes of damages. Moreover, Nichole's $23 million-plus award leaves no doubt in anyone's mind that her recovery far exceeded the statutory offer. [¶] Under these facts, therefore, we decline to mechanically apply *Randles*." (*Fortman*, at p. 263.)

The court adopted a similar analysis in *Stallman v. Bell* (1991) 235 Cal.App.3d 740 (*Stallman*) to conclude that a joint offer by two plaintiffs supported an award of expert witness fees under section 998. There, the plaintiffs (an individual and a decedent's estate) made a joint section 998 offer to several defendants, who did not accept it. After the plaintiffs received a judgment in their favor, the trial court awarded them costs, including expert witness fees. (*Stallman*, at p. 744.) Defendants appealed, contending that the section 998 offer was void from its inception because it was made jointly by the individual plaintiff and the decedent's estate. (*Stallman*, at p. 745.) *Stallman* disagreed and affirmed, noting that although the section 998 offer was joint, the jury's award was also joint. Accordingly, "there is but a single verdict to be compared to a single offer, and from this comparison it can be clearly determined whether or not the

[plaintiffs] received a more favorable judgment." (*Stallman*, at p. 747.) Because the joint offer "does not prevent a determination of whether [plaintiffs] received a more favorable judgment," it was valid and plaintiffs were properly awarded expert witness fees under section 998. (*Ibid.*)

b. Offers jointly made by defendants

In *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141 (*Persson*), the plaintiff sued his former business partner and a corporation on a variety of tort theories. Before trial, the individual defendant and the corporate defendant made an offer under section 998 to allow judgment to be taken against them, jointly and severally, in the amount of $500,000. (*Persson*, at p. 1169.) Plaintiff declined the offer. Following a jury trial, judgment was entered (a) in favor of plaintiff and against the individual defendant for $306,000, and (b) in favor of the corporate defendant. (*Id.* at p. 1151.)

The corporate defendant filed a motion under section 998 for fees because the plaintiff failed to recover more than the $500,000 offered. (*Persson*, *supra*, 125 Cal.App.4th at p. 1169.) The trial court denied the motion, ruling that defendants' section 998 offer was invalid because it was " 'a joint and several offer for multiple defendants and did not separate out and distinguish between them and the separate causes of action applicable to each.' " Accordingly, the trial court said, the plaintiff " 'was not in a position to evaluate the offer.' " (*Persson*, at p. 1169.)

The Court of Appeal reversed, concluding that defendants' section 998 offer was not rendered invalid by the fact that it was jointly made. (*Persson*, *supra*, 125 Cal.App.4th at p. 1172.) The court explained that for a joint section 998 offer to be valid, the offeree must be able to evaluate the likelihood of receiving a more favorable verdict at trial. (*Persson*, at p. 1170.) The joint nature of the present offer did not prevent the plaintiff from fairly evaluating it: "[I]t is incomprehensible why a plaintiff would be unable to evaluate an offer in which each defendant offers to have judgment taken against him, jointly and severally, in a stated amount, even if one defendant has no liability on one of the plaintiff's claims. The plaintiff need only assess the chances of recovery on each of his claims, no matter which defendant is liable, and add them

together. If the joint offer exceeds that amount, the plaintiff should accept it. In this case, [plaintiff] had only to assess his chances of recovering more than $500,000 on all of his claims against both defendants. . . . The evaluation is straightforward, as is the ability to determine after trial whether the offer was more favorable than the judgment." (*Id.* at pp. 1170-1171.)

The court also rejected the plaintiff's contention that the joint offer placed him in an untenable position because he had to "either take the unapportioned offer 'or perhaps risk paying enormous post-offer attorneys' fees to only one of the Defendants.' " (*Persson, supra*, 125 Cal.App.4th at p. 1171.) The court explained: "There is no such risk. The offer was joint, and [plaintiff] could not accept the offer as against one defendant and not the other. Even if, after trial, one defendant were found to have no liability, *that defendant could not claim post-offer costs against* [*plaintiff*] *unless the other defendant's liability was also less than the offer, since the offer was a joint offer.*" (*Id.* at p. 1171, italics added.)

C. The "Comparison" Approach Is More Consistent with the Statutory Purpose of Encouraging Reasonable Settlements and Avoiding Gamesmanship

Where the language of section 998 does not provide "a definitive answer for a particular application of its terms," courts have been directed to adopt a construction consistent with the policies section 998 seeks to further. (*Martinez, supra*, 56 Cal.4th at p. 1020.) The "comparison" approach best does so, as we now explain.

Policy of encouraging reasonable settlements. As we have said, the policy behind section 998 is to " 'encourage the settlement of lawsuits prior to trial' [citations] . . . [by providing] 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.' (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.) At the same time, the potential for statutory recovery of expert witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.' " (*Martinez, supra*, 56 Cal.4th at p. 1019.)

Whether a settlement offer is "reasonable" for section 998 purposes is determined by comparing the settlement offer against the offeree's actual recovery. "As explained, the Legislature sought to encourage settlement by affording the benefit of enhanced costs to parties who make reasonable settlement offers and imposing the burden of those costs on offerees *who fail to obtain a result better than they could have achieved by accepting such offers*." (*Martinez*, *supra*, 56 Cal.4th at p. 1025, italics added.)

Where an offer is jointly made by a group of defendants, we conclude the relevant comparison for section 998 purposes is of (a) the offer made by the group of defendants, and (b) the recovery obtained *against that same group of defendants*. That is, if two or more defendants jointly make an offer to settle, the "reasonableness" of that offer cannot be determined by comparing the judgment entered against fewer than all of the offering defendants. Instead, the offer must be compared to the judgment (or judgments) obtained against *all* defendants. The "comparison" approach thus is consistent with the policy section 998 seeks to further because it permits the offering party to recover its expert witness fees *only* if the offer and judgment concern the same parties, such that the judgment reveals whether the offer was reasonable.

The "absolute prevailing party" approach, in contrast, does not require the comparison of a joint offer and a joint judgment. Instead, it permits an offering party who submits a joint offer to recover witness fees under section 998 so long as that party has "absolutely prevailed" against the offeree—without regard to the recovery against the other offerors.

The flaw in the "absolute prevailing party" approach is well illustrated by the present case. Here, 20 defendants made a joint offer to settle this case for $75,000. To evaluate the reasonableness of that offer, Kahn had to "assess the chances of recovery on each of his claims, no matter which defendant is liable, *and add them together*. If the joint offer exceeds that amount, the plaintiff should accept it." (*Persson*, *supra*, 125 Cal.App.4th at p. 1170, italics added.) Here, however, there is not yet a final judgment between Kahn and all 20 defendants, against which the joint settlement offer can be measured. As a result, all we can determine at this juncture is that the offer made

by *20* defendants exceeds Kahn's recovery against *14*. Neither we nor the trial court thus can evaluate whether the offer exceeded the judgment, and the award of expert witness fees therefore was premature.

Defendants suggest that the premature award of section 998 witness fees is not unfair because defendants tried repeatedly, but unsuccessfully, to "obtain the dismissal of the subset of defendants comprising [] individual persons, family trusts, and several unrelated business entities, on the grounds that there was never a colorable claim against these individuals and entities." Whatever the merits of defendants' claim factually, it has no relevance legally. *Defendants*, not Kahn, controlled the form in which their settlement offer was made. If some defendants believed Kahn did not have a colorable claim against them, they were free to make a separate offer to Kahn. Instead, because all 20 defendants elected to make a joint settlement offer, defendants must wait until a final judgment has been entered against the same 20 defendants before seeking expert witness fees under section 998.

Avoiding uncertainty and gamesmanship. Our Supreme Court has directed that when interpreting section 998, courts "should assess whether the particular application injects uncertainty into the section 998 process. If a proposed rule would encourage gamesmanship or spawn disputes over the operation of section 998, rejection of the rule is appropriate. . . . In other instances, courts have adopted bright-line rules in order to avoid confusion." (*Martinez*, *supra*, 56 Cal.4th at p. 1021, citations omitted.)

Interpreting section 998 as defendants suggest would create precisely the opportunity for gamesmanship we have been directed to avoid. That is, defendants suggest that even if a section 998 offer has been jointly made, particular defendants should be permitted to recover expert witness fees under section 998 if they prevail against the plaintiffs. Such a rule, however, would create an incentive in every multi-defendant case for the defendants to jointly make a low-ball offer that would guarantee individual defendants enhanced costs if any *one* of them were to be dismissed or found not liable. Such a rule would not encourage the making or accepting of reasonable offers—to the contrary, it would encourage defendants to make *unreasonable* offers for

the sole purpose of recovering enhanced fees, and would unfairly pressure plaintiffs to accept such offers.

D. The Cases on Which Defendants Rely Do Not Support Their Analysis

Defendants cite two cases they contend suggest that expert witness fees were properly awarded here. We do not agree. In both cases, multiple defendants jointly made section 998 offers that exceeded the judgments the plaintiffs recovered after trial; in both cases, the appellate courts held the section 998 offers were valid and supported awards of enhanced costs in favor of the defendants. (*Brown v. Nolan*, *supra*, 98 Cal.App.3d 445; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 115-116 (*Santantonio*).) Defendants contend, therefore, that these cases support their recovery of expert witness fees because they establish that "where defendants are alleged to be joint[ly] and severally liable for a plaintiff's damages, joint offers by two or more defendants are valid under section 998."

The problem with defendants' analysis is that its premise (the section 998 offer was valid) does not logically support its conclusion (the award of expert witness fees to the 14 dismissed defendants was therefore proper). There is no real dispute that defendants' section 998 offer is valid and could support an award of witness fees *in appropriate circumstances*. The issue before us is whether the present case—in which a judgment has yet to be entered as to six of the 20 defendants on whose behalf the section 998 offer was made—presents such circumstances. Neither *Brown* nor *Santantonio* sheds any light on that question, because in each case judgment was rendered with respect to *all* defendants before any section 998 fees were sought.

For all of these reasons, we conclude that the trial court's award of expert witness fees in this case was premature.

DISPOSITION

The judgment is reversed insofar as it awards expert witness fees to the 14 dismissed defendants under section 998, and is otherwise affirmed. The trial court is directed to hold in abeyance the dismissed defendants' request for expert witness fees pending entry of final judgments as to all defendants. At such time as final judgments have been entered as to all defendants, the parties should be given the opportunity to submit amended briefs on the section 998 expert witness fees issue, and the trial court should redetermine that issue consistent with the views expressed in this opinion. Kahn is awarded his appellate costs.

CERTIFIED FOR PUBLICATION

EDMON, P. J.

We concur:

KITCHING, J.

JONES, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EMAIL FROM BEVERLY PELLEGRINI
(5/11/15)

Dear Mr. Hebert:

Assembly Bill 1683 sponsored by Assemblyman Curt Hagman in the 2011-2012 session was supposed to clarify the Estate of Powell (2000) 83 Cal. App. 4th 1434 in which William and Myrtle Powell had created a joint revocable trust in which ONLY Myrtle was the Trustee (Myrtle's son Ronald was the Successor Trustee) and William was Trustor.

William and Myrtle transferred their joint tenancy titled residence and other assets into the trust with the declaration in the trust document that all assets in the trust were to be characterized as community property. As William was decidedly not the trustee of the trust, William held NO BARE LEGAL TITLE to any asset. When Myrtle died, the trust remained revocable by the surviving trustor but only up to William's 1/2 share in the community property. William was able to revoke his portion because, as Trustor, the Court found that the trust provided revocability power to the trustor during the survivorship period.

The law Probate Code 15401 (b)(2) intended to provide the revocability power of William to the entirety of all trust property. Had William been allowed to revoke the trust as he desired as Trustor, he would have been able to control all assets during his lifetime, including possibly divesting Ronald of any interest. This was the intent of the legislation that was supported by California Judges Association. People should have the right to leave their assets to whomever they choose.

The probate code, however, makes no determination of the meaning of joint lifetimes of the trustors. In the case of Powell, the Court determined that William retained revocability power by language "anytime during the lifetime of either Trustor." This language was changed in the Powell trust form the 1988 version, "at anytime during the lifetime of the Trustors." The phrase "joint lifetimes of the Trustors" was deemed in Hedwick to allow full revocability during the survivorship period. Barron's Law Dictionary by Steven H. Gifis defines joint lives as a period that lasts until the death of the last to survive of two or more specified persons, which seems to me an accurate definition. Applied to trustors, joint lifetimes would by synonymous with joint lives, and the revocability power would be extended to include the survivorship period.

It is clear from many conversations with attorneys, that joint lifetimes of the trustors, joint lifetimes of either trustors, or the joint lifetime of the trustors is interpreted different ways at different times. This misuse of language results in decisions that cannot add clarity to the law.

In Trust documents, the joint life of the Trustors in ambiguous on its face because it can either mean two lives of both trustors or that the surviving trustor has less rights than the two trustors had together or singly. This situation creates a problem because if the surviving trustor actually contributed the majority of assets to the joint revocable trust, this surviving trustor might lose power and control over assets that this surviving trustor owned and contributed. It is not likely that such a condition would be envisioned by the trustors knowingly.

Because Probate Code 15401 (b)(2) depends on the revocability clause inside a trust, appropriate codified language to be used to signify revocability should be made. Adding a definition of terms will go a long way to avoid the failings of careless drafting and will allow the parties to fix their documents should they fall prey to careless drafting.

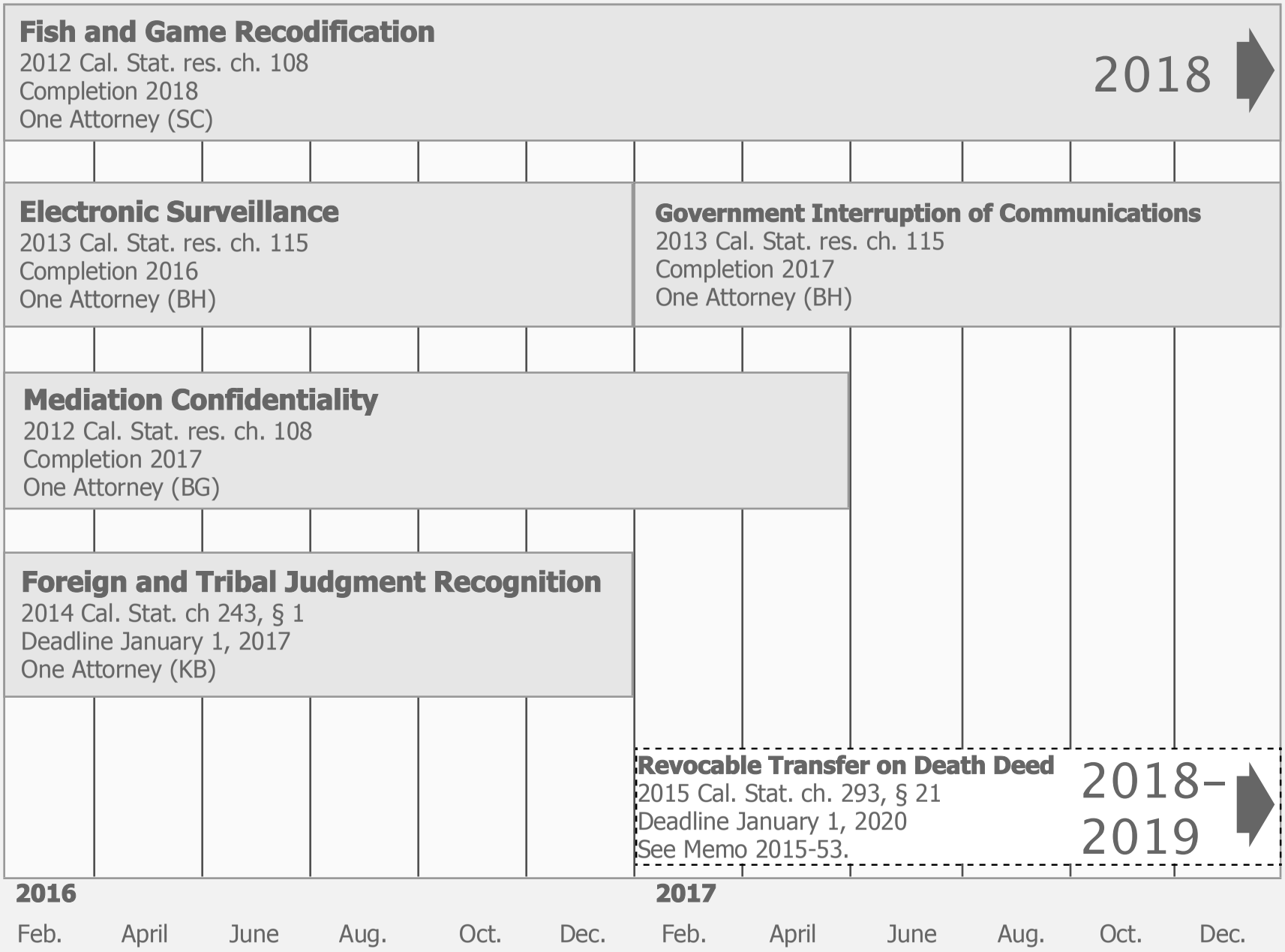
Trial and probate courts are still upholding Powell without regard to the change in law. This is preventing the legislative intent of protecting spousal property rights and resulting in Courts abusing the surviving Trustor's property rights. The Courts abuse of codified law is resulting in financial losses that should not be taking place. Courts are not autonomous institutions that can willy-nilly pick and choose which laws they wish to uphold and which laws they wish to avoid. Yet, this is exactly the behavior of the Courts and the practice is becoming rampant throughout the state in all legal areas.

On a second note, California trained lawyers tend to have only vague understanding of the title of joint tenancy. Each joint tenant owns the whole present interest of the asset, which allows for survivorship. As each joint tenant passes away, the last remaining joint tenant takes nothing from the other previous joint tenants. The surviving joint tenant is the only owner remaining because all previous interests have been extinguished. When joint tenants transfer joint tenancy titled assets into a joint revocable trust with themselves as trustors and trustees, although the beneficial and legal titles are bifurcated between the original joint tenants as now trustors and trustees, respectively, the same individuals hold the same interest with no declaration or intent to the contrary. The property was transmuted from community property characterized property to separate characterized property when the asset was purchased and titled by the original joint tenants in joint tenancy. There is no legal term "joint tenancy characterized" property. Joint tenancy is a title; the characterization of this property is separate. When lawyers and courts adopt the bogus language of joint tenancy characterization, no one can possibly know whether one is speaking of the title, the interest represented by the title, or the character of the property.

It is unfortunate that these concepts continue to plague the Probate Code because of careless drafting of the code that allows attorneys to abuse the code for their own benefit. It should not be tolerated under any circumstances that the Judiciary is becoming a private enterprise system, without any meaningful oversight, to engage in aiding and abetting lawyers to abuse the law to provide a stream of revenues to the Courts.

Sincerely,
Beverly Pellegrini

Projected Completion of Active Studies — 2016 / 2017



EX 30